Filed 7/28/16 In re E.F. CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re E.F., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. E.F., Defendant and Appellant.	A146224 (Solano County Super. Ct. No. J41505)

I.

INTRODUCTION

Appellant E.F. was declared a ward of the court under Welfare and Institutions Code section 602.[1] He contends the juvenile court abused its discretion by ordering his placement in a locked juvenile facility, Challenge Academy, rather than a less restrictive placement. We conclude the juvenile court acted within its discretion and affirm the placement order.

Appellant also argues that the juvenile court imposed an unconstitutionally vague condition of probation by requiring him to "attend school regularly and maintain acceptable grades, behavior and attendance." We agree and modify the condition.

[1] All subsequent references are to the Welfare and Institutions Code unless otherwise identified.

II.

FACTUAL AND PROCEDURAL BACKGROUND

The original wardship petition for appellant was filed in June 2012 alleging appellant, then age 14, had committed a sexual battery against his mother. Appellant touched his mother's vaginal area and also touched his four-year-old sister. In September 2012, appellant was judged a ward of the court and placed in a group home with sex offender treatment. In January 2014, appellant returned home to his mother.

During April and May 2014, appellant repeatedly missed school and showed poor academic performance. He failed to abide by his curfew. In August 2014, appellant committed a probation violation by failing to abide by his curfew and not returning home. Appellant demonstrated "non-complian[t]" behavior including failure to attend school, failing his classes, gang affiliation, and marijuana and alcohol use.

The Solano County District Attorney filed a second juvenile wardship petition in December 2014. It alleged appellant had committed first degree residential burglary in violation of Penal Code section 459. The juvenile court sustained the burglary allegation and continued appellant's wardship. Appellant was returned to his mother's home on continued probation with electronic monitoring.

In May 2015, the Solano County District Attorney filed a third juvenile wardship petition alleging appellant committed a misdemeanor of providing false information to a police officer. Appellant was stopped in a car with suspected gang members (a violation of his probation), and provided a false name to police officers.

Appellant's probation officer, Monika Jones, prepared a report prior to the contested disposition hearing. The report stated that appellant had "displayed problematic behaviors such as disobeying his mother, not adhering to his curfew, and not attending school." Appellant had been detained in juvenile hall, attended the weekend probation academy, and was referred to a day reporting center. Appellant had a history of truancy and his grades included three Fs, one D, one C, and one pass. He had 12 disciplinary referrals at school for disruptive and defiant behavior.

Jones recommended appellant be returned to his mother's home under probation supervision. She stressed that appellant admitted his probation violation and took responsibility for his actions. Although appellant continued to "experience issues with compliance in the home, school and community," Jones did not believe he was a serious risk to reoffend. Jones recommended appellant return to the day reporting center.

The juvenile court held a contested disposition hearing over three dates in June, July, and August 2015. Jones testified at the June hearing. Jones explained she had been appellant's probation officer for approximately two years. She stated that appellant continued to associate with Sureño gang members. She explained that appellant had been at the day reporting center before, had attended five weekend probation academies, and been gone from his home for nearly a month and a half. She stated although appellant's behavior was "troubling," she wanted to give him one more opportunity to remain at home. She did not believe appellant had a substance abuse problem even though he had been caught with marijuana.

The prosecution requested that appellant be placed in Challenge Academy because he had been given numerous opportunities in the community to address his behavior, and all of them had failed. Challenge Academy could address his school performance and provide programs to transition him to a job since he was 17 years old. Appellant had a problem with running away and a locked facility would address that concern.

Appellant's counsel argued that Officer Jones believed appellant could change and deserved another opportunity to try community placement. Appellant was making progress in the right direction. The court responded that appellant was not "improving when you go from a misdemeanor to a felony, because the last offense was a first degree burglary, a pretty serious crime." Further, appellant had multiple probation violations between the disposition of the second juvenile wardship petition and the third petition. The court stated that because appellant had difficulty living at home with his mother even as a minor, it was concerned about where he would live once he turned 18 in eight months time. The court noted that when appellant was in a structured environment, he did better in school. On the other hand, when he was on his own, he did not attend

school, he got poor grades, and fought with teachers. There was every indication from his past behavior that home placement would not succeed and he needed out-of-home treatment.

The court stated that it was not convinced of the best placement: "Challenge might be the best program because he's going to hit 18 in February, and AB-12[2] support might be there for him, if he goes through a group home, and I can see where Courage to Change or someplace like that might be good for him." The court elected to seek a recommendation from the "Probation Placement Committee" (the Committee). The court specifically inquired whether Challenge Academy was the best option.

In a report to the court dated June 29, 2015, the Committee recommended Challenge Academy. It concluded given "the prior interventions the minor has received which included a prior group home placement, intensive supervision caseloads (JSO and DRC [day reporting center]), EMP [electronic monitoring program], weekend academy assignments, traffic court, and individual/family counseling[,] the most appropriate placement" was Challenge Academy. It ruled out other placements that focused on substance abuse treatment because appellant did not have serious substance abuse issues. A group home placement was not advisable because of appellant's history of running away and the fact that he was a flight risk. Placement in a group home and AB 12 services were not necessary because appellant's mother had expressed a willingness to allow him to return home.

The report noted that Challenge Academy was a nine-month program that would allow appellant to get treatment in a safe, secure, and therapeutic environment while preparing him for family reunification and reentry into the community. He could complete high school courses and learn job readiness skills.

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[2] AB 12 refers to the California Fostering Connections to Success Act, which is designed to provide services to foster and probation youth after age 18. (§§ 11400 et seq.)

After the continued hearing on July 6, 2015, the court requested the Committee screen appellant for other placements: Rites of Passage, Courage to Change, Excell, and Wilderness Outreach or other camp-setting group homes.

Probation conducted the screening and found appellant unsuitable for placement in any of the listed programs. Appellant had in-person interviews with Rites of Passage and Wilderness Recovery, and he refused to participate in the programs. Both Courage to Change and Wilderness Recovery rejected appellant because of his history of sexual misbehavior. Appellant was accepted to participate in Excell, but it primarily offered substance abuse treatment and counseling and appellant did not have a serious substance abuse problem. Excell did not offer gang suppression services. Probation stated it was "questionable what he would get out of being placed at Excell." Probation continued to recommend Challenge Academy.

The court held a final dispositional hearing on August 3, 2015. The prosecution requested appellant be placed in Challenge Academy and appellant's counsel requested Excell. Appellant's counsel argued that Excell was the right program for appellant because it would help him transition to living on his own, and he would have the option of AB 12 services. The court stated that it felt appellant would have been best served by Rites of Passage or Courage to Change, but those programs would not accept him. "The problem, if he's going to go to and interview and basically, essentially give them an attitude, where they don't [think] he's going to be successful, and they don't accept him for that, there's not much I can do about it." The court stated it accepted probation's view that Excell was not the best program for appellant. The best programs for him would not take him because of his prior history, but mostly because of his attitude at the respective interviews. "So I would have preferred to have put him in a group home that matched his problems, but there doesn't seem to be one available now, so now I think I'm left with only really one option, or at least one option that suits him. There's more than one option, but taking all the factors into consideration, I think Challenge is now in his interest."

The court granted probation and ordered a maximum period of confinement of six years four months. Appellant was ordered removed from his mother's custody and placed in Challenge Academy. The court ordered commitment in juvenile hall for 70 days. As a condition of probation, the court ordered appellant must "attend school regularly and maintain acceptable grades, behavior and attendance."

III.

DISCUSSION

A. *The Juvenile Court Did Not Abuse Its Discretion by Selecting a Custodial Placement for Appellant*

A juvenile court's commitment order may be reversed on appeal only upon a showing that the court abused its discretion. (*In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329-1330.) "An appellate court will not lightly substitute its decision for that rendered by the juvenile court. We must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them. [Citations.] In determining whether there was substantial evidence to support the commitment, we must examine the record presented at the disposition hearing in light of the purposes of the Juvenile Court Law. [Citations.]" (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395.) As described in section 202, those purposes include rehabilitation, treatment, guidance, punishment as a rehabilitative tool, and protection of the public. (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 575–576 (*Teofilio A.*).)

Section 202 provides that the care, treatment, and guidance of minors under juvenile court jurisdiction shall be consistent with the minor's best interests and "in conformity with the interests of public safety and protection." (§ 202, subd. (b).) Within the bounds of section 202, the juvenile court "has broad discretion to choose probation and/or various forms of custodial confinement in order to hold juveniles accountable for their behavior, and to protect the public. [Citation.]" (*In re Eddie M.* (2003) 31 Cal.4th 480, 507.) Juvenile placements "need not follow any particular order . . . [n]or does the

court necessarily abuse its discretion by ordering the most restrictive placement before other options have been tried. [Citations.]" (*Ibid.*)

"In determining the judgment and order to be made in any case in which the minor is found to be a person described in Section 602, the court shall consider, in addition to other relevant and material evidence, (1) the age of the minor, (2) the circumstances and gravity of the offense committed by the minor, and (3) the minor's previous delinquent history." (§ 725.5.)

Appellant argues the juvenile court abused its discretion by placing him in the Challenge Academy, a locked facility, when Excell was a more appropriate placement. Appellant contends under section 721.1, subdivision (a), the court was required to place him in the least restrictive setting consistent with his best interest. Appellant, however, concedes that the court does not have a duty to try less restrictive placements or to state its reasons for rejecting them.

The court does not have to state on the record its consideration of less restrictive placements and its reasons for rejecting them if there is evidence on the record to show a consideration of less restrictive placements was before the court. (See *Teofilio A.*, *supra*, 210 Cal.App.3d at p. 577.)

Here, the juvenile court carefully considered all the options. Rather than accepting the prosecution's request for custodial placement at the first hearing, the court requested the Committee evaluate appellant's options. Then at a second hearing, after the Committee recommended custodial placement at Challenge Academy, the court requested evaluation of another set of placement options. The court ordered probation to screen appellant for four additional programs: Rites of Passage, Courage to Change, Excell, and Wilderness Outreach or other camp-setting group homes.

Finally, at the third hearing, when all the options had been evaluated, the court found that Challenge Academy was the proper placement. The court explained that it would have preferred placement in a less restrictive alternative, but appellant's sexual offense history and poor attitude during the interviews had removed the possibility of those placements. The Committee recommended Challenge Academy, which met

appellant's rehabilitative needs. The custodial placement also would address his poor school attendance, poor academic performance, running away from home, and his gang affiliation.

Appellant argues the court did not take into account what program would best serve his rehabilitative needs. He contends his rehabilitative needs included: (1) improving family dynamics; (2) improving his school attendance, school behavior and grades and; (3) removing his gang affiliation and association. Appellant also expressed the need for AB 12 services after he turned age 18.

The alternative program requested by appellant was designed for youth with serious substance abuse issues which was not a problem for appellant and it did not offer gang suppression services. In addition, a noncustodial placement would not help with appellant's consistent problem of running away and failing to attend school.

The evidence in the record demonstrated several failed attempts at home placement. Appellant had already completed a prior group home placement, attended five weekend probation academies, had electronic monitoring, and individual and family counseling. After evaluating all of the options available to appellant and the programs he required, the court accepted the Committee's recommendation of Challenge Academy.

Finally, appellant argues the court erred by failing to consider the fact he could benefit from AB 12 services that were not available at Challenge Academy. However, appellant did not present any evidence to the juvenile court that he would need AB 12 services. The only evidence before the court was the probation report that stated appellant's mother said he could continue to live with her, thereby diminishing, if not eliminating, the need for foster care services.

Weighing all the factors, substantial evidence supported the juvenile court's conclusion that Challenge Academy was the best available placement for appellant.

B. *The Probation Condition Requiring Acceptable Grades, Behavior, and Attendance Is Vague and Must Be Modified*

The court ordered the following condition of probation: appellant must "attend school regularly and maintain acceptable grades, behavior and attendance."[3] Appellant did not object at the hearing.

On appeal, appellant argues that the probation condition is unconstitutionally vague. Although no objection was made to the condition, an appellant may challenge a probation condition as unconstitutionally vague or overbroad on its face, because it presents a pure question of law. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*).)

A probation condition " 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.]" (*Sheena K.*, *supra*, 40 Cal.4th at p. 890, quoting *People v. Reinertson* (1986) 178 Cal.App.3d 320, 324–325.) The "underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.]" (*Sheena K.*, at p. 890.) "A probation condition which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process." (*People v. Freitas* (2009) 179 Cal.App.4th 747, 750.)

The court addressed a similar probation condition in *In re Angel J.* (1992) 9 Cal.App.4th 1096 (*Angel J.*) The court ordered Angel to "maintain satisfactory grades." (*Id.* at p. 1099.) Angel argued that the requirement of satisfactory grades was unconstitutionally vague because he did not know what was required of him. (*Id.* at

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[3] In the minute order issued after the hearing, the court ordered appellant to "[m]aintain passing grades in the grading system utilized [by] the minor's school, and obey school rules." When there is a discrepancy between the minute order and the oral pronouncement of judgment, the oral pronouncement controls. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.) As explained in this section, the oral pronouncement at the hearing is unconstitutionally vague. The court's minute order was not vague and is the type of condition that should be imposed in the future.

p. 1101.) The term "satisfactory" is inherently subjective, and he could not know what grades would amount to violation of probation. (*Id.* at p. 1102.) The court held to "resolve the constitutional issue, we find that satisfactory grades means passing grades in each graded subject." (*Id.* at p. 1102, fn. omitted.) A passing grade in an A through F grading system is a D or above, not failing. (*Id.* at p. 1102, fn. 7.) The court ordered the term "satisfactory grades" shall be defined in accordance with the opinion and the judgment modified accordingly. (*Id.* at p. 1103.)

Like the term "satisfactory," here the term "acceptable" is vague. Appellant is unable to determine what grades or behavior might violation his probation. It also delegates discretion to the probation officer to determine which grades and types of behavior are "acceptable."

Accordingly, we modify the condition to require appellant: (1) to attend school regularly; (2) maintain passing grades (meaning D or above in an A through F grading system); and (3) comply with school rules regarding behavior. (See *Angel J.*, *supra*, 9 Cal.App.4th at p. 1102 & fn. 7.) Modifying the condition to define "acceptable grades" as passing grades and "acceptable behavior" as compliance with school rules gives appellant notice of what is required of him and provides objective criteria against which his performance can be assessed.[4]

[4] We note that conditions requiring juvenile defendants to maintain acceptable grades, behavior and attendance have been routinely imposed in Solano County and found to be vague and overbroad by this court. (See, e.g., *In re C.C.* (Oct. 30, 2015, A143161) [nonpub. opn.], Div. Five finding condition to maintain acceptable grades, behavior and attendance unconstitutionally vague and overbroad]; *In re Ronald P.* (Sept. 1, 2015, A143335) [nonpub. opn.], Div. Two finding condition unconstitutionally vague]; *In re K.C.* (May 15, 2015, A140947) [nonpub. opn.], Div. Five finding condition unconstitutionally vague].)

IV.

DISPOSTION

The court's dispositional order is modified to read: "Attend school regularly, maintain passing grades (meaning D or above in an A through F grading system) and comply with school rules regarding behavior." As modified, the judgment is affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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RIVERA, J.

A146224, *In re E.F.*